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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1929.

No. [redacted] 29

CLINTON R. WHITE,

vs.

GEORGE E. Q. JOHNSON AND H. D. HAYES.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Brief for Appellant.

HENRY K. URION,
HENRY W. DRUCKER,
Solicitors for Appellant.

HAWKINS & LOOMIS CO., LAW PRINTERS, CHICAGO

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No. 573

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1929.

CLINTON R. WHITE,

vs.

GEORGE E. Q. JOHNSON AND H. D. HAYES.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR APPELLANT.

Jurisdiction.

The case is here on Certificate from the United States Court of Appeals for the Seventh Circuit, under Section 239 of the Judicial Code, as amended by the Act of February 13, 1925.

Questions certified.

The questions presented by the Certificate are these:

Question 1. Did a person who, prior to the enactment of the Radio Act of 1927, applied for and was granted successive licenses by the Secretary of Commerce for the operation of a broadcasting station, and who owned and continuously operated such broadcasting station, whereby it developed a following of listeners and advertisers which constituted a going business, have or acquire thereby property (fol. 7) in the continued operation of such station, with power appropriate to continue the operation of

said business, within the meaning of the word "property" as used in the Fifth Amendment to the Constitution of the United States?

Question 2. If the answer to Question 1 is in the affirmative, is the Joint Resolution of Congress of December 8th, 1926, valid as against the claim that by virtue of the waiver it requires it works a deprivation of such property without due process of law or a taking of private property for public use without just compensation?

Question 3. If the answer to Question 1 is in the affirmative, is the Radio Act of 1927, as amended, valid as against the claim that, by virtue of the waiver required in the last paragraph of Section 5 and by virtue of the condition required to be contained in all licenses by subparagraph (A) of Section 11, it works a deprivation of such property without due process of law or a taking of private property for public use without just compensation?

Question 4. If the answer to Question 1 is in the affirmative, is the Radio Act of 1927, as amended, valid as against the claim that it authorizes or requires the Federal Radio Commission, in its action on an application for renewal of license by a person such as is described in Question 1, to take private property for public use without just compensation, either by denying such application or by granting it on such terms as virtually to destroy a going broadcasting business of such person?

Question 5. If the answer to Question 1 is in the affirmative, is the Radio Act of 1927, as amended, valid as against the claim that it authorizes or requires the Federal Radio Commission, in acting upon an application for renewal of license by said person, to deprive such person of such property (fol. 8) without due process of law, in that the only standards provided by the Act for the guidance of the Commission in acting upon such applications are that of "public interest, convenience or necessity" and that set forth in Section 5 of the Amendatory Act of March 28, 1928, and in that the Act fails to require that the Commission, prior to proceeding to a hearing or decision on such application, shall specify in what respect it deems or has failed to find that the granting of such application would not serve public interest, convenience or necessity?

Constitutional provisions and statutes involved.

The relevant portions of the Constitution and of the Statutes are printed as an appendix hereto.

Statement.

The Certificate (p. 1) sets forth the facts as follows:

Appeal was taken to this court from an order entered October 16, 1928, by the United States District Court for the Northern District of Illinois, denying application of plaintiff-appellant for an injunction *pendente lite* against defendants. The injunction prayed for was to restrain the United States Attorney for the Northern District of Illinois and the local Supervisor of Radio, Department of Commerce, from enforcing the penal provisions (Secs. 32 and 33) of the Radio Act of 1927 against plaintiff either for violation of the provisions of that Act or for violation of an order of the Federal Radio Commission dated August 22, 1928.

[fol. 2] Since August 15, 1926, appellant has continuously owned and operated a radio station in the City of Chicago of the type and character commonly known as a broadcasting station, under the call letters WCRW. Appellant has had successive licenses, first from the Secretary of Commerce under the Act to Regulate Radio Communication of August 13, 1912, and, after the enactment of the Radio Act of 1927 on February 23, 1927, from the Federal Radio Commission. Appellant's first license from the Secretary of Commerce was issued August 15, 1926, as a result of an application therefor by appellant in which application appellant designated the normal sending wave-length of his station as 720 kc. and requested the call-letters WCRW. The license covered a period of three months and, on its expiration, was succeeded by a succession of licenses similar in form and in duration, each issued by the Secretary of Commerce on the application of appellant, until the termination of said Secretary's authority by the Radio Act of 1927. On February 10,

1927, in compliance with the Joint Resolution of Congress, approved December 8, 1926, and as part of an application for licenses attached thereto, appellant executed and filed with the Secretary of Commerce a statement as follows:

"The applicant hereby waives any right or any claim of right, as against the United States, to any wave-length, or to the use of the ether in radio transmission, because of previous license to use the same or because of the use thereof."

From August 15, 1926, until April 26, 1927, appellant operated his station with a power of 1,000 watts.

After the establishment of the Federal Radio Commission the Commission issued successive licenses to appellant from time to time, each license being preceded by a written application executed, sworn to, and filed by appellant. Each application contained the following statement:

[fol. 3] "The applicant waives any claim to the use of any particular frequency or wave length or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise, and requests a radio station license in accordance with this application."

Each license issued by the Commission to appellant contained the following condition:

"This station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies or wave-length designated in the license beyond the term thereof nor in any other manner than authorized therein."

The licenses issued by the Commission from time to time were for varying periods but never in excess of three months.

The first license issued by the Commission was dated April 26, 1927, and authorized appellant to operate his station on 760 kc. with 500 watts. The next license was dated June 15, 1927, and authorized appellant to operate his station on 1340

kc. with 500 watts. All licenses thereafter until September 1, 1928, authorized appellant to operate on 1340 kc. with 500 watts. Under all licenses issued by the Commission appellant has had to divide time with two other stations.

Since September 1, 1928, as a result of action of the Commission taken on August 22, 1928, appellant has been authorized to operate his station with only 100 watts, on a division of time with two other stations. This action of the Commission, which led to the filing of the bill of complaint herein by appellant, was preceded by the following proceedings:

On January 12, 1928, appellant duly filed an application for a renewal of the license then held by him (for 500 watts on 1340 kc. on a division of time with two other broadcasting stations). This license originally covered a period of sixty (60) days beginning November 1, 1927, but was extended from time to time for short periods of from thirty to sixty days so that it finally expired on September 1, 1928. [fol. 4] On May 25, 1928, the Commission entered an order known as General Order 32 in which, after reciting that it had examined appellant's said application for renewal of license, together with similar applications on the part of 163 other broadcasting stations, and that it was not satisfied that public interest, convenience or necessity would be served by granting any of said applications, the Commission fixed Monday, July 9, 1928, ten o'clock A. M. in its offices at Washington, D. C., as the time and place for a hearing on each of said applications. The Commission notified appellant of the order by mailing a copy of it to appellant, which copy was accompanied by a letter addressed to appellant stating, among other things:

"At this hearing unless you can make an affirmative showing that public interest, convenience or necessity will be served by the granting of your application, it will be finally denied."

Similar letters accompanied by copies of the order were sent to the 163 other broadcasting stations covered by the order.

On July 9, 1928, appellant appeared before the Commission by counsel, as did a large proportion of the other broadcasting stations included in the order, and hearings on the applications of said stations were set at various times during the following two weeks. The hearing on appellant's application for renewal was held partly on July 16, 1928, and partly on July 23, 1928.

On August 22, 1928, the Commission took action with reference to appellant's application as follows:

"Federal Radio Commission, Washington, D. C.

File No. 138. Docket No. 109.

"In re Application of Clinton R. White, Station WCRW, for Renewal of License.

[fol. 5] "Order

"The Commission having considered the evidence and the arguments presented to it in the above-entitled case, heretofore heard and taken under advisement, and having found that public interest, convenience or necessity would not be served by granting said application unless the power heretofore used by the applicant be reduced to 100 watts, and then only subject to such changes in authorized frequency, power, and hours of operation as the Commission may in the future find to be in the public interest, convenience or necessity, or necessary in order to comply with the provisions of Section 5 of the Radio Act of 1928, and further subject to such extension or extensions of the applicant's existing license, thus modified with respect to authorized power, as the Commission may hereafter order.

"It is ordered that, pending the issuance of a renewal of said license in accordance with said findings, the existing

license of said applicant be, and the same is hereby, modified by reducing the power authorized therein to 100 watts; this order to be effective on September 1, 1928, at the hour of 3 o'clock A. M., Eastern Standard Time.

"It is further ordered that said existing license, thus modified, be, and the same is hereby, further extended for a period of thirty (30) days to terminate at 3 o'clock a. m. Eastern Standard Time, October 1, 1928.

"Federal Radio Commission, by Ira E. Robinson, Chairman.

"Dated August 22nd, 1928."

Appellant received a copy of the foregoing on or about August 24, 1928. Appellant filed his bill of complaint on September 12, 1928.

[fol. 6] The approximate value of the physical equipment constituting appellant's station is $5,000.00. Up to the time of filing his bill of complaint appellant had expended approximately $16,472.89 in the operation of the station. The gross revenues derived by appellant from the station, consisting of payments by advertisers for the broadcasting of advertising material from the station, amounted to $160.00 in 1926, (4½ months), $7,433.45 in 1927, and $8,925.87 in 1928 (7 months). It does not appear that on or prior to February 23, 1927, appellant's station was operating at a profit and presumably it was not. At the time of filing the bill of complaint and for some time prior thereto, however, appellant's net profits from the station were about $400.00 a week. Appellant is dependent upon this income as his chief source of livelihood.

The physical equipment constituting appellant's station is so designed that it will not operate efficiently or satisfactorily with power as low as 100 watts. To broadcast efficiently and satisfactorily with 100 watts appellant will have to replace a very substantial portion of his present apparatus with new and different apparatus. The reduction in power has caused

a reduction in the area served by appellant's station to not more than one-fourth its former size with the result that appellant has lost a large proportion of his listening public and his advertising clientele.

Summary of Argument.

I. A radio broadcasting station established prior to the enactment of the Radio Act of 1927 acquired a property right, within the meaning of the Fifth Amendment, in the continued operation of such station with power appropriate to reach the territory it has served. The establishment and operation of such station was a utilization of a part of the total facilities available for broadcasting, hence, figuratively speaking, was an appropriation of such *quantum* of the "ether" as was utilized in the operation of such station without interference with other stations, on the principle of "first in use, prior in right." Such use of the ether constituted a property right similar to that acquired in the diversion and use of the waters of non-navigable streams on the public domains of the Western states. Furthermore, broadcasting is an occupation in which the proprietor of a broadcasting station had the right to engage, and the continued conduct of such business is a property right within the meaning of the Fifth Amendment.

The right of Congress to take or destroy private property on navigable waters in the aid of navigation is not a proper analogy from which to argue that a broadcaster acquired no property right "in the air" that was not subject to appropriation by Congress. Navigable waters have always been a highway of commerce, and title to private property thereon is acquired subject to the dominant servitude of use for navigation. Hence, when a privately-owned oyster bed under navigable waters is destroyed in dredging a channel to improve navigation, the owners are not entitled to compensation, because it

was planted with the possibility of such contingency. The broadcasting medium termed "the ether," on the contrary, was not subject to such prior use. It was, in fact, virtually created, as a practical, commercial medium, by broadcasting itself.

The Radio Act of 1912, enacted to apply to radio telegraphy, permitted public notice of the claim of rights of broadcasters licensed thereunder, being, in effect, but a registration statute. Licenses issued under it were terminable only for cause, or in case of war licensed stations might be taken upon payment of just compensation. The issuance of licenses constituted a recognition on the part of the government of the right to establish such broadcasting stations. The broadest application that can be made of that Act is that licenses thereunder were expressly made subject to future regulation of Congress. Such provision, however, did not limit the rights of licensees, because if radio broadcasting constitutes interstate commerce that is subject to regulation by Congress, it would have such power, whether or not expressly reserved by the provision of that Act.

II. Destruction of such a broadcasting station as a going business, either by reduction of power or refusal of license, is a taking of the property of such station in violation of the Fifth Amendment. If Congress has any authority over radio broadcasting it is the power to *regulate* broadcasting as interstate commerce. Such authority must be exercised under constitutional limitations. The power to *regulate* does not include the power to destroy or confiscate private property. If necessary to take private property for the public welfare in the regulation of radio broadcasting, just compensation must be paid. Depriving an owner of the use of his property is a taking of that property as much as if the actual physical property were taken.

III. The waiver requirements of the Joint Resolution of Congress of December 8, 1926, and of the Radio Act of 1927, are equally repugnant to the Fifth Amendment if such waivers be construed to prevent the assertion of previously acquired property rights of the licensees required to execute such waivers. The indirect deprivation of a Constitutional right by a grant of privilege from the legislature conditioned upon waiving that Constitutional right is void as would be the direct deprivation of such Constitutional right.

IV. The Radio Act of 1927 is invalid because it authorizes or requires the Federal Radio Commission to act upon the application for renewal of the license of a previously established broadcasting station by determining whether the operation of such station would be for "public interest, convenience or necessity." Such a standard is meaningless when applied to radio broadcasting, for there are no previously established criteria of what is "public interest, convenience or necessity" as applied to broadcasting. Furthermore, the Commission was not required and did not, as a matter of practice, specify in what respects it deemed or failed to find that the granting of such application would not serve "public interest, convenience or necessity." Therefore, an applicant could have no issues to which he might address himself. Of necessity, the decision by the Commission was merely an arbitrary determination, based only on its own state of mind, and not on predetermined standards or issues. Such a proceeding lacks the requirements of due process of law.

ARGUMENT.

I.

The right to continue the operation of a radio broadcasting station, established prior to the enactment of the Radio Act of 1927, with power appropriate to reach the territory it has served, is "property" within the meaning of the Fifth Amendment to the Constitution.

The development of radio broadcasting during the last decade constituted a new utilization by man of a natural phenomenon that had never before been so used. Because the phenomenon is not thoroughly understood and for want of better terminology it is said that the radio waves are broadcast through the "ether." The number of stations that can broadcast, without interference with each other, is limited. Hence, each such station utilizes a part of the total facilities that are available for broadcasting. Therefore, the establishment of a broadcasting station, regularly operating with fixed power, constituted an appropriation of such *quantum* of the "ether" as was necessary for its operation with that amount of power, to the exclusion of other stations which would cause interference with its broadcasting. Such appropriation, whatever be the medium or the nature of the phenomenon of radio broadcasting, constitutes a property right on the same principles that have come down through the ages from the origin of ownership of property.

Blackstone treats of the right of property as founded upon priority of possession (Blackstone's Commentaries, Book II, Chapter 1, page 9):

> "Property, both in lands and movables, being thus originally acquired by the first taker, which taking amounts to a declaration that he intends to appropriate

> the thing to his own use, it remains in him, by the principles of universal law, till such times as he does some other act which shows an intention to abandon it. * * *"

Similarly, Emer de Vattel expounds the right of the first occupant in "Law of the Nations," Vol. III, page 84:

> "All men have an equal right to those things which have not yet come into the possession of anyone, and these things belong to the person who first takes possession. The right of the first comer (*jus praeventionis*) should be faithfully observed in the use of common property which cannot be used by several persons at the same time."

Right of property through priority of occupation is recognized in territorial acquisition. "Title by occupation is gained by the discovery, use and settlement of territory not occupied by a civilized power." Moore, "Digest of International Law," p. 258.

Similarly, the exclusive right to use a mark or device claimed as a trade-mark is founded upon priority of use, constituting a property right. *Columbia Mill Co.* v. *Alcorn*, 150 U. S. 460.

In determining the respective right of competing public utilities operating in the same field, priority of time gives superiority of right in the location of their respectve physical properties. In *Los Angeles Gas and Electric Co.* v. *City of Los Angeles*, 241 Fed. 912 (affirmed 251 U. S. 32), the District Court said (p. 919):

> "When, however, pursuant to the terms of its lawful franchise, it has established its poles and wires and other instrumentalities in the public streets, it may lawfully and properly object to being compelled to remove or relocate them in order that another company, a competitor of later origin and right coming in, may take their place and thereby be enabled to carry on its own intended business. In other words, in this as in many other relations, first in time is first in right, and superiority of right consequent upon being first in time may not be nullified by even necessary requirements of a competitor or other utility later in time and therefore inferior in right."

The property right of a broadcasting station to the use of such *quantum* of the ether as was required for the transmission of the broadcasting waves emanating from that station with the power upon which it operated, is perhaps, best established by the doctrine of priority of appropriation as applied to water rights in non-navigable streams of the Western states. Rights to the use of water in flowing streams and the right to the use of the ether for broadcasting are similar in nature, both being usufructuary rather than absolute and the property right to the continued use of both media being acquired by priority of appropriation.

The development of that doctrine following the discovery of gold in California was described by Mr. Justice Field in *Jennison* v. *Kirk*, 98 U. S. 453 (p. 457):

> "The discovery of gold in California was followed, as is well known, by an immense immigration into the State, which increased its population within three or four years from a few thousand to several hundred thousand. The lands in which the precious metals were found belonged to the United States, and were unsurveyed, and not open, by law, to occupation and settlement. Little was known of them further than that they were situated in the Sierra Nevada mountains. Into these mountains the emigrants in vast numbers penetrated, occupying the ravines, gulches and canyons, and probing the earth in all directions for the precious metals. Wherever they went, they carried with them that love of order and system and of fair dealing which are the prominent characteristics of our people. In every district which they occupied they framed certain rules for their government, by which the extent of ground they could severally hold for mining was designated, their possessory right to such ground secured and enforced, and contests between them either avoided or determined. These rules bore a marked similarity, varying in the several districts only according to the extent and character of the mines; distinct provisions being made for different kinds of mining, such as placer mining, quartz mining and mining in drifts or tunnels. They all recognized discovery, followed by appropriation, as the foundation of the possessor's title, and development by working as the condition of its retention. And they were so framed as to secure to all com-

ers, within practicable limits, absolute equality of right and privilege in working the mines. Nothing but such equality would have been tolerated by the miners, who were emphatically the lawmakers, as respects mining, upon the public lands in the State. The first appropriator was everywhere held to have, within certain well defined limits, a better right than others to the claims taken up; and in all controversies, except as against the government, he was regarded as the original owner, from whom title was to be traced. But the mines could not be worked without water. Without water the gold would remain forever buried in the earth or rock. To carry water to mining localities, when they were not on the banks of a stream or lake, became, therefore, an important and necessary business in carrying on mining. Here, also, the first appropriator of water to be conveyed to such localities for mining or other beneficial purposes, was recognized as having, to the extent of actual use, the better right. The doctrines of the common law respecting the rights of riparian owners were not considered as applicable, or only in a very limited degree, to the condition of miners in the mountains. The waters of rivers and lakes were, consequently, carried great distances in ditches and flumes, constructed with vast labor and enormous expenditures of money, along the sides of mountains and through canyons and ravines, to supply communities engaged in mining, as well as for agriculturists and ordinary consumption. Numerous regulations were adopted, or assumed to exist, from their obvious justness, for the security of these ditches and flumes, and the protection of rights to water, not only between different appropriators, but between them and the holders of mining claims. These regulations and customs were appealed to in controversies in the State courts, and received their sanction; and properties to the value of many millions rested upon them. For eighteen years, from 1848 to 1866, the regulations and customs of miners, as enforced and molded by the courts and sanctioned by the legislation of the State, constituted the law governing property in mines and in water on the public mineral lands."

Again in *Atchison* v. *Peterson*, 20 Wall. 507 (p. 215), Mr. Justice Field said with respect to the rights of the first appropriator of water:

"And he who first connects his own labor with prop-

> erty thus situated and open to general exploration, does, in natural justice, acquire a better right to its use and enjoyment than others who have not given such labor. So the miners on the public lands throughout the Pacific States and Territories by their customs, usages and regulations everywhere recognized the inherent justice of this principle; and the principle itself was at an early period recognized by legislation and enforced by the courts in those States and Territories."

Appellant has a property right not merely in the right to broadcast but in the right to broadcast with power sufficient to reach the territory he had established and regularly served, which use measured the *quantum* of the ether thereby appropriated by him. Appellant's property right was co-extensive with his appropriation and use, as was likewise the right of western miners to the appropriation of water dependent upon the amount and the character of the diversion as appropriated by them. *Atchison* v. *Peterson* (*supra*) (p. 514):

> "The right to water by prior appropriation, thus recognized and established as the law of miners on the mineral lands of the public domain, is limited in every case, in quantity and quality, by the uses for which the appropriation is made * * *."

The principles applicable to navigable waters, that the Government may destroy or damage private property located in the beds of navigable streams, bridges or wharves over or abutting navigable streams or riparian rights on navigable streams, have no application and are not a true analogy in determining the rights of radio broadcasters to the use of the ether.

From prehistoric time navigable waters have borne ships in commerce, the earliest form of communication and trade. The right to sail the navigable bodies of water of the earth has descended to us from the very earliest of times. This right not only included the waters of the sea and inland lakes but also the rivers and water courses which were cap-

able of floating vessels in the aid of commerce, whether the soil under those waters was owned by the crown, the state or by private individuals. This right to the use of waters has been recognized by all nations and from the earliest civilization, as an inherent public right, needing no legislative sanction.

> "All navigable waters are under the control of the United States for the purpose of regulating and improving navigation, and although the title to the shore and submerged soil is in the various states and individual owners under them, it is always subject to the servitude in respect of navigation created in favor of the Federal government by the Constitution." *Gibson* v. *United States*, 166 U. S. 269 (p. 272).
>
> "Whatever the nature of the interest of a riparian owner in the submerged lands in front of his upland bordering on a public navigable water, his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such water. It is a qualified title, a bare technical title, not at his absolute disposal, as is his upland, but to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation." *Scranton* v. *Wheeler*, 179 U. S. 141 (p. 162).
>
> "If, in the judgment of Congress, the use of the bottom of the river is proper for the purpose of placing therein structures in aid of navigation, it is not thereby taking private property for a public use, for the owner's title was in its very nature subject to that use in the interest of public navigation." *United States* v. *Chandler-Dunbar Water Power Company*, 229 U. S. 53 (p. 62).
>
> "* * * the absolute title of the riparian proprietor extends to highwater mark only, and between ordinary high and ordinary low water mark, his title to the soil is qualified, it being subject to the public rights of navigation over it, and of improvement of the stream as a highway." *Philadelphia Co.* v. *Stimson*, 223 U. S. 605 (p. 629).

Thus, when, in aid of navigation, private bridges across navigable waters are removed, oyster beds on the submerged soil under navigable waters are destroyed, or docks or other

property abutting navigable waters are rendered useless, there is no taking of property in the constitutional sense.

> "By necessary implication from the dominant right of navigation, title to submerged lands is acquired and held subject to the power of Congress to deepen the water over such lands or to use them for any structure which the interest of navigation, in its judgment, may require. The plaintiff in error has, therefore, no such private property right which, when taken, or incidentally destroyed by the dredging of a deep-water channel across it, entitles him to demand compensation as a condition." *Lewis Blue Point Oyster Cultivation Co.* v. *Briggs*, 229 U. S. 82 (p. 88).

But if Congress takes or destroys any property which is not inherently subject to the dominant right of navigation, even though such Congressional action is for the purpose of improving or aiding navigation, then the limitations of the Fifth Amendment must be observed and just compensation must be paid.

In *United States* v. *Cress*, 243 U. S. 316, this court, after stating the above principles, said, at the bottom of page 325:

> "It follows from what we have said that the servitude of privately-owned lands forming the banks and bed of a stream to the interests of navigation is a natural servitude, confined to such streams as, in their ordinary and natural condition, are navigable in fact, and confined to the natural condition of the stream. And, assuming that riparian owners upon non-navigable tributaries of navigable streams are subject to such inconveniences as may arise from the exercise of the common right of navigation, this in like manner must be limited to the natural right. The findings make it clear that the dams in question, constructed by the government in the Cumberland and Kentucky rivers, respectively, are for raising the level of those streams along certain stretches by means of backwater, so as to render them, to the extent of the raising, artificial canals instead of natural waterways. In the language of engineering, the government has "canalized" the rivers. We intimate no doubt of the power of the United States to carry out this kind of improvement. * * *"

> "But the authority to make such improvements is only a branch of the power to regulate interstate and foreign commerce, and, as already stated, this power like others, must be exercised, when private property is taken, in subordination to the 5th Amendment. *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 336; *United States* v. *Lynah*, 188 U. S. 445, 465, 471. And we deem it clear that so much of the properties of the respective defendants in error as was unaffected by the flow of the rivers or their tributaries prior to the construction of the locks and dams in question was private property, and not subject to be overflowed, without compensation, in the raising of the level of the rivers by means of artificial dams."

See, also,

Pumpelly v. *Green Bay and Mississippi Canal Co.*, 80 U. S. 166.

United States v. *Lynah*, 188 U. S. 445.

The establishment and continuous operation of a broadcasting station prior to the enactment of the Radio Act of 1927 was an appropriation of such *quantum* of the ether as was necessary for the operation of such station on its established power and such an appropriation was the utilization of a natural phenomenon not theretofore so used or subjected to possession or utility, in the same way that waters from the streams in the Western domains were taken and diverted for the use of mining operations. Such use of the ether was not subject to any prior servitude whatsoever as have been navigable waters since time immemorial. To the contrary, the ether, whatever the nature of that phenomenon, was created as a usable, natural element for such purpose by radio broadcasting itself. The pioneer stations successively established during the years prior to 1927 virtually created the element itself by making commercially and practically possible the magic of radio broadcasting.

As each broadcasting station "came on the air," it owed the duty to prior broadcasters to find such wave length

and transmit with such power that it did not interfere with prior appropriators of the ether. In the same way, late comers among the western miners could divert waters from such streams or in such quantities only as not to affect the rights of prior users. Likewise, each such broadcasting station could require that subsequently established stations would not interfere with the broadcasting of the earlier appropriator. Apparently such rights were recognized by broadcasters generally for, so far as is reported, only one case arose in which such rights between broadcasters were involved. In *Tribune Company* v. *Oak Leaves Broadcasting Station, Inc.*, an unreported decision by Judge Francis S. Wilson of the Circuit Court of Cook County, Illinois (quoted, Congressional Record, Vol. 68, Part I, P. 216-219), the court applied the established principle of "priority of time creates a superiority in right," granting an injunction on the application of an older station restraining the interfering operation of a subsequently established radio station.

A person establishing a broadcasting station prior to the enactment of the Radio Act of 1927 acquired a property right in still another sense. The operation of such broadcasting station became a business or an occupation of its proprietor, in which he had the right to establish himself. The profits derived from the operation of appellant's station constituted his chief source of livelihood. (Cert. fol. 6.) Such business or occupation constitutes a property right in the constitutional sense, entitled to the protection of the 5th Amendment. The fact that broadcasting is a business of recent origin makes it no less an ordinary occupation and the right to follow it no less a natural right.

In *Louis K. Liggett Co.* v. *Baldridge*, 278 U. S. 105, this court declared unconstitutional a statute of the State of Pennsylvania requiring owners of drug stores to be registered pharmacists, the court saying at page 111:

> "That appellant's business is a property right (*Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443, 465; *Truax*

v. *Corrigan*, 257 U. S. 312, 327), and as such entitled to protection against state legislation in contravention of the Federal Constitution, is, of course, clear. * * *

"The act under review * * * deals in terms only with *ownership*. It plainly forbids the exercise of an ordinary property right and, on its face, denies what the Constitution guarantees. A state cannot, 'under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them.' *Jay Burns Baking Co.* v. *Bryan*, 264 U. S. 504, 513. See also *Meyer* v. *Nebraska*, 262 U. S. 390, 399, 400; *Norfolk & W. R. Co.* v. *Public Service Commission*, 265 U. S. 70, 74; *Pierce* v. *Society of Sisters*, 268 U. S. 510, 534, 535; *Weaver* v. *Palmer Bros. Co.*, 270 U. S. 402, 412-415; *Fairmont Creamery Co.* v. *Minnesota*, 274 U. S. 1, 9-11."

To the same effect see

Allgeyer v. *Louisiana*, 165 U. S. 578.
Lochner v. *New York City*, 198 U. S. 45.
Adair v. *United States*, 208 U. S. 161.
Dent v. *State of West Virginia*, 129 U. S. 114.
Powell v. *Pennsylvania*, 127 U. S. 678; *Smith* v. *Texas*, 233 U. S. 630.
Pennsylvania Coal Co. v. *Mahon*, 260 U. S. 393.

Prior to the enactment of the Radio Act of 1927 there was in effect "an act to regulate radio communication" approved August 13, 1912 (hereinafter referred to as the Radio Act of 1912) which, as a matter of history, was enacted as applying only to radio telegraphy. At the time that act was put in the books radio broadcasting was unknown, except as a laboratory hypothesis. Under this Act appellant had the right to commence operation of his broadcasting station and to create a property right therein. Under the express provisions of that Act a license issued thereunder was terminable only for cause or by the Government in time of war, in which event just compensation must be paid.

The issuing of licenses under the Radio Act of 1912 by the Secretary of Commerce was a mere ministerial act, and

that official had no right to refuse the issuance of a license or to revoke any license except for cause. The so-called license, therefore, which was issued under the Radio Act of 1912 amounted merely to a registration of the broadcasting station for which issued, and the refusal to issue such license would not have withheld the right to broadcast.

Thus in *Hoover* v. *Intercity Radio Co.*, 286 Fed. 1003, the Court of Appeals of the District of Columbia held that the Radio Act of 1912 gave no discretion to the Secretary of Commerce to refuse licenses to broadcasting stations applying therefor, and in *United States* v. *Zenith Radio Corporation* (D. C., N. D. Ill., E. D.) 12 Fed. (2d) 614, Judge Wilkerson held that the operation of a radio station upon a wave length other than the one assigned in the license did not subject the company so operating the station to the penalties provided by the Act.

The Attorney General of the United States finally advised the Secretary of Commerce that he had no discretion in the issuing of licenses under the Radio Act of 1912, and that this Act entitled an applicant to a license thereunder as a matter of right. In that opinion, dated July 8, 1926, (35 Op. Atty. Gen. 126), the Attorney General held that the Secretary of Commerce had no power to restrict the operation of a station with reference to frequency and power, or hours of operation, and that the Secretary was required to issue a license to an applicant for the frequency requested. See also opinion of Attorney General Wickersham, dated November 22, 1912, 29 Op. Atty. Gen. 579.

Section 11 of that Act (U. S. Code, Title 47, Section 52) provides "every such license shall be subject to the regulations contained herein and such regulations as may be established from time to time by authority of Sections 1 to 10 of this Title or subsequent acts and treaties of the United States." At the most then, a broadcasting station established or licensed under such Act was subject to *regulation*

by Congress and if such Act were applicable to radio broadcasting stations, or if Congress had the power to license radio broadcasting stations, it would have the power of regulation thereof, whether or not such right were reserved by the provisions of the Radio Act of 1912.

If that Act affected whatsoever the right to acquire a property right in broadcasting, it would seem to constitute an acquiescence on the part of the government in the establishment of the right to broadcast, such as referred to in *Atchison* v. *Peterson*, (*supra*, p. 512) or, licenses having been issued to broadcasting stations under the provisions of that Act, it estopped Congress from saying that such property rights were not acquired, which was the basis of the *Monongahela Navigation Co. case* (*infra*), as stated by this Court in *Greenleaf-Johnson Lumber Co.* v. *Garrison*, 237 U. S. 251, 265.

II.

Deprivation of the right of an established broadcasting station to continue the operation thereof with appropriate power to reach the territory it has served, is a taking of the property of such station in violation of the Fifth Amendment. The Radio Act of 1927 authorizes such action by the Federal Radio Commission, either by denying an application for renewal of the license of such station or by granting it on such terms as virtually to destroy the going business thereof, hence is invalid, because taking private property for public use.

If Congress has the power to regulate radio broadcasting, such authority is derived from its power to regulate interstate and foreign commerce. "But like the other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the 5th Amend-

ment * * *." *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 336.

The reduction in power of appellant's station as ordered by the Federal Radio Commission was not merely a regulation of its broadcasting but it was virtually a prohibition thereof. "The reduction in power has caused a reduction in the area served by appellant's station to not more than one-fourth its former size with the result that appellant has lost a large proportion of his listening public and his advertising clientele." (Cert., fol. 6.)

Chief Justice Marshall defined the extent and nature of the commerce power in *Gibbons* v. *Ogden*, 9 Wheat. 1 (p. 196): "It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed."

In *Hammer* v. *Dagenhart*, 247 U. S. 251, 269, this power was further defined as "one to control the means by which commerce is carried on, which is directly the contrary of the assumed right to forbid commerce from moving and thus destroy it as to particular commodities."

In that case it was held that Congress had no power to prohibit products of child labor from moving in interstate commerce under the guise of regulation of interstate commerce. Decisions such as *Champion* v. *Ames*, 188 U. S. 321 (Lottery Tickets); *Hipolite Egg Co.* v. *United States*, 220 U. S. 45 (Pure Food); *Hoke* v. *United States*, 227 U. S. 308 (White Slave Act), and *James Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U. S. 311 (Intoxicating Liquors) were declared (page 270) to be based "upon the character of the particular subjects dealt with" and that (page 271):

> "In each of these instances the use of interstate transportation was necessary to the accomplishment of harmful results. In other words, although the power over interstate transportation was to regulate, that could only be accomplished by prohibiting the use of the facilities of interstate commerce to effect the evil intended."

The order of the Federal Radio Commission reducing the power of appellant's station was as effective a taking of his property as though the physical equipment thereof were actually confiscated. The order deprived appellant of the use of the physical equipment of the station for continuing the business that he had built up (Cert., fol. 6). It also prohibited the use of the extent of the ether in which he had acquired such property right and from continuing to broadcast to the radio public which his station had been serving. Deprivation of the use of property or the going business of operating such property is as effective a taking of that property as confiscation of the physical property itself.

In *United States* v. *Lynah* (*Supra*), at page 470, this court said:

> "It is clear from these authorities that where the government by the construction of a dam or other public works so floods lands belonging to an individual as to substantially destroy their value there is a taking within the scope of the 5th Amendment. While the government does not directly proceed to appropriate the title, yet it takes away the use and value; when that is done it is of little consequence in whom the fee may be vested."

Again, in *Pumpelly* v. *Green Bay Company*, 13 Wall. 166, this court said, at pages 177 and 178:

> "It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government * * * it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent; can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an au-

> thority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors."

And in *United States* v. *Cress* (*Supra*), this court said, at page 328:

> "It is true that in the *Pumpelly case* there was an almost complete destruction, and in the *Lynah case* a complete destruction of the value of the lands, while in the present case the value is impaired to the extent of only one-half. But it is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking."

Furthermore, the effect of the order reducing the power of appellant's station is to take that property, not for public use, but for the private use of other radio broadcasting stations allowed to remain on the air and use the broadcasting facilities of the ether from which appellant was ejected. This is a violation of the "due process of law" clause of the Fifth Amendment. Ostensibly, this action was taken for the public good of the radio listening public inasmuch as the Radio Act of 1927 requires such action of the Commission to be for "public interest, convenience or necessity." Radio broadcasting is a private enterprise, presumably for the profit and gain of the individual broadcasting station, and is not a public utility. The reduction of the power of appellant's station necessarily resulted in other broadcasting stations being permitted to use appellant's property as effectively as though the transmitters and equipment of appellant's station were taken and turned over to another broadcasting station for the operation thereof. The "wireless" telegraph industry grew up under the Radio Act of 1912. Likewise, "wireless" stations are required to be licensed under the Radio Act of 1927. Would it be contended that all of the licenses of one "wireless" telegraph company could be terminated to be issued to a competitor by action of the Fed-

eral Radio Commission which it deemed to be for "public interest, convenience or necessity"? The question seems its own answer, yet such a situation differs from the instant case only in degree, not in principle.

In *Missouri Pacific Railway Co.* v. *Nebraska,* 164 U. S. 403, the right was denied of the State Board of Transportation to order the Missouri Pacific Ry. Co. to permit the erection of a grain elevator by a farmer's association on the railroad right of way, holding that the effect thereof was to take the private property of the railway company without its consent for the private use of another, resulting in the taking of property without due process of law. See also *Cole* v. *LaGrange,* 113 U. S. 1.

And in *Los Angeles Gas and Electricity Co.* v. *City of Los Angeles* (*supra*) this court said, at page 40:

> "It will be observed that we are not concerned with the duty of the corporation operating a public utility to yield uncompensated obedience to a police measure adopted for the protection of the public, but with a proposed uncompensated taking or disturbance of what belongs to one lighting system in order to make way for another. And this the 14th Amendment forbids."

The property and property rights in a radio broadcasting station established prior to the enactment of the Radio Act of 1927 may possibly be said to have been acquired with the limitation or restriction of the power of Congress to regulate whatever interstate commerce resulted from the operation of such broadcasting station. Even if that be true, such property and property rights were not acquired subject to the power of Congress, under the guise of regulation of interstate commerce, to destroy such property and property rights by prohibiting the effective operation of such broadcasting station.

The power of Congress to enact reasonable regulations to foster and promote interstate commerce, is no greater than the police power of the State to enact reasonable laws for

the promotion of public health, safety and welfare. Yet in *Pennsylvania Coal Co.* v. *Mahon,* 260 U. S. 393, this court held unconstitutional a statute of the State of Pennsylvania forbidding the mining of coal under private dwellings or streets as applied to a coal mining company that had previously acquired such rights, saying, per Mr. Justice Holmes, at page 414, 415:

> "It is our opinion that the Act cannot be sustained as an exercise of the police power * * * What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impractical to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it. * * *
>
> "* * * The protection of private property in the 5th Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in decisions upon the 14th Amendment. * * * When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.
>
> "The general rule, at least, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. * * * We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

Decisions upholding zoning ordinances and other laws regulating the height of buildings, the intensity of building development, and otherwise restricting the use of property, are based upon the police power of states to regulate the use of property which may result in consequential damages to the property owner, but whenever such law or the exercise of police power unreasonably results in the taking of property by preventing the use thereof, such legislative action falls within the restrictions of the 5th or 14th Amendments. *Adair*

v. *United States,* 208 U. S. 161; *Lochner* v. *New York,* 198 U. S. 45; *Allgeyer* v. *State of Louisiana,* 165 U. S. 578; *Adams* v. *Tanner,* 244 U. S. 590; *Weaver* v. *Palmer Brothers Company,* 270 U. S. 402; *Truax* v. *Corrigan,* 257 U. S. 312.

The Radio Act of 1927 (Sec's. 4 (f), 11) purports to give to the Federal Radio Commission the authority to reduce the power of a station or to refuse the renewal of a license or to revoke the license of a station established prior to the passage of that Act, even though such order virtually destroys the going broadcasting business of such stations. The authority of the Commission is in the broadest possible terms—measured only by "public convenience, interest or necessity." Thus, the Commission is authorized to take the private property of an established broadcasting station for public use without just compensation. On the principles above set forth, the answer to Question 4 must be in the negative.

III.

The waivers required by the Joint Resolution of Congress of December 8, 1926, and by the Radio Act of 1927, are invalid.

The waivers required by the Joint Resolution of Congress of December 8, 1926, and by the Radio Act of 1927, are repugnant to the 5th Amendment if the effect thereof is to prevent the assertion of the property right of a broadcasting station acquired prior thereto.

The Joint Resolution of Congress of December 8, 1926, provides:

> "* * * no original radio license or the renewal of an existing license shall be granted after the date of the passage of this resolution unless the applicant therefor shall execute in writing a waiver of any right or of any claim to any right, as against the United States, to any wave length or to the use of the ether in radio transmission because of previous license to use the same or because of the use thereof."

The waiver provided by Section 5 of the Radio Act of 1927 is as follows:

> "No station license shall be granted by the commission or the Secretary of Commerce until the applicant therefor shall have signed a waiver of any claim to the use of any particular frequency or wave length or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise."

As applied to the proprietor of a previously established broadcasting station, the waivers provided for in the Joint Resolution of December 8, 1926, and in the Radio Act of 1927, either are not to be so construed as to prevent the assertion of the property rights so acquired or the requirement for such waivers is invalid. If no property right was acquired or if Congress has the power to destroy such property rights, then the waivers would have no significance and the requirement of such waivers was wholly unnecessary and of no effect.

Likewise, if these waivers are interpreted merely as waiving the right to object to valid and constitutional *regulation* of such broadcasting stations by Congress under its power to regulate interstate commerce, then, also, such waivers were unnecessary, for such powers could be exercised by Congress irrespective of the requirement for the execution of such waivers by broadcasters.

If, however, such waivers are to be construed as preventing such broadcasters from asserting their property rights or as waiving the requirement that Congress can take such property rights only upon payment of just compensation, then the statutory requirement of such waivers, as a condition to securing a license, is unconstitutional and repugnant to the 5th Amendment.

In *Pullman Co.* v. *Kansas*, 216 U. S. 56, this court declared invalid a statute of Kansas requiring that, as a condition for the right of a foreign corporation to do a local business in

Kansas, it should pay a certain proportion of its capital as a charter fee, such requirement being held to be a burden on the company's interstate business. In approving *Western Union Telegraph Company* v. *Kansas*, 216 U. S. 1, this court stated the principle at page 63:

> "That the state could no more exact such a waiver than it could prescribe as a condition of the company's right to do local business in Kansas that it agree to waive the constitutional guaranty of the equal protection of the laws, or the guaranty against being deprived of its property otherwise than by due process of law."

In *Southern P. Co.* v. *Denton*, 146 U. S. 202, this court held invalid a Texas statute providing that the application of a foreign corporation to do business in the State should contain a stipulation that the permit should become null and void if the corporation, being sued in the State court, should remove the case into a court of the United States, the court saying, by Mr. Justice Gray:

> "But that statute, requiring the corporation, as a condition precedent to obtaining a permit to do business within the State, to surrender a right and privilege secured to it by the Constitution and laws of the United States, was unconstitutional and void, and could give no validity or effect to any agreement or action of the corporation in obedience to its provisions."

In *Home Insurance Company of New York* v. *Morse*, 20 Wall. 445, this court held unconstitutional a statute of Wisconsin providing that a foreign corporation shall not transact business within the state unless it stipulated in advance that it would not remove into the Federal courts any suit commenced against it by a citizen of Wisconsin and that an agreement of an insurance company, made in conformity to the statute, derived no support from the unconstitutional statute and was void, as it would be had no such statute been passed. The line of decisions following this case were approved in *Terral* v. *Burke Construction Company*, 257 U. S. 529, the court expressly overruling divergent decisions.

In *Frost* v. *Railroad Commission,* 271 U. S. 583, this court held that a private carrier is unconstitutionally deprived of his property without due process of law by a statute requiring him to become a public carrier in order to secure a permit to use the public highways for transportation purposes. This court said, pages 592, 593:

> "That, consistently with the due process clause of the 14th Amendment, a private carrier cannot be converted against his will into a common carrier by mere legislative command, is a rule not open to doubt and is not brought into question here. * * * The naked question which we have to determine, therefore, is whether the state may bring about the same result by imposing the unconstitutional requirement as a condition precedent to the enjoyment of a privilege, which, without so deciding, we shall assume to be within the power of the state altogether to withhold if it sees fit to do so. * * *
>
> "It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the Federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."

IV.

The standard of "public interest, convenience, or necessity," provided by the Radio Act of 1927 for determination by the Federal Radio Commission of its denial of licenses to pre-existing radio broadcasting stations, is so indefinite that such action by the Commission constitutes a taking of property without due process of law.

The Radio Act of 1927 (Sections 4, 11) provides for the issuance or renewal of licenses by the Federal Radio Commission if, in the judgment of the Commission, such licenses serve the "public interest, convenience or necessity." This is the only standard provided by the Act for guidance, instruction or restriction of the Commission in its actions. Such phrase has a definite, intelligent meaning when applied to public utilities and whether or not a common carrier is providing facilities in the "public interest, convenience or necessity" is a determinable fact. Radio broadcasting, however, is so new, is developing so rapidly, and is subject to such a variety of methods of operation, that it is impossible to determine which, if any, of the many varied phases of broadcasting are in "public interest, convenience or necessity." Furthermore, the Federal Radio Commission is not required, prior to a hearing on an application for a license, to define "public interest, convenience or necessity" as affects such applicant or to advise the applicant what issues it will have to meet on such hearing. In the instant case (Certificate, page 4) the appellant was advised of the hearing prior to the entry of the order in question and told, "At this hearing unless you can make an affirmative showing that public interest, convenience or necessity will be served by the granting of your application it will be finally denied." Such test is so broad and meaningless as applied to radio broadcasting that neither the appellant nor any applicant could possibly prepare for and meet any issue at such hearing. The result

is that, of necessity, any decision by the Federal Radio Commission on an application for a license must be left to the arbitrary determination of the Commission by such mental process as it deems fit to determine whether or not a license should be granted. In effect, Congress delegated legislative power to the Federal Radio Commission. Such procedure lacks the requirements of due process of law.

In *Yick Wo* v. *Hopkins,* 118 U. S. 356 (p. 370), this Court said,

> "* * * while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people * * *. And the law is the definition and limitation of power. It is, indeed, quite true, that there must always be lodged somewhere, and in some person or body, the authority of final decision * * *. But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the Commonwealth 'may be a government of laws and not of men.' For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

In *Hewitt* v. *Board of Medical Examiners,* 148 Cal. 590, the Supreme Court of California declared unconstitutional a statute giving a state board the power to revoke the license of a physician for advertising by "grossly improbable statements", the Court saying,

> "The right which a person possesses under the Constitution and the laws to practice his profession as a physician and surgeon cannot be made to depend upon a provision of a statute as vague, uncertain and indefinite as is the provision we have been considering."

In *Interstate Commerce Commission* v. *Louisville and Nashville Railroad Company*, 227 U. S. 88, this Court held void an order of the Interstate Commerce Commission which was not supported by formal proof at the hearing required to sustain such order, overruling the contention that the lack of such proof might be supplied by indulging a presumption that the findings of the Commission were supported by information which it was required to obtain in performing its duties, the Court saying, at pages 90 and 93:

> "A finding without evidence is arbitrary and baseless. And if the government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our government. It would mean that, where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another, is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power.
>
> "In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the 'indisputable character of the evidence. ' * * *"
>
> "In such cases the Commissioners cannot act upon their own information, as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the Commission had before it extraneous, unknown, but presumptively sufficient information to support the finding. *United States* v. *Baltimore & O. S. W. R. Co.*, 226 U. S. 14."

See also *Wichita Railroad and Light Company* v. *Public Utilities Commission*, 260 U. S. 48; *Whitfield* v. *Hanges* (C. C. A. 8th Circuit 1915), 222 Fed. 745.

Conclusion.

This case presents the application of established constitutional principles to the unique situation involved in radio broadcasting. Essentially, the question is whether a pioneer broadcaster who, at the risk of money and effort contributed to the creation of broadcasting, shall be deprived of the fruits of his accomplishments when it develops that the success of his enterprise is so great as to become clothed with a public interest. If the Radio Act of 1927 be valid it will mark a departure from previous concepts of constitutional principles. In the light of the marvelous accomplishments of mankind, it is impossible to foresee the effect of the revolutionary doctrine of that Act upon future situations which may result from man's genius. The purpose sought to be accomplished by Congress can be effected without disregarding constitutional limitations. If it be properly determined that the public good requires a limitation of pre-existing radio broadcasting stations, such result can be brought about constitutionally by paying just compensation to the stations required to relinquish their rights. Conceivably such compensation could properly be provided by license fees charged to broadcasting stations remaining on the air and benefiting from such increased broadcasting facilities. We again repeat the observation of Mr. Justice Holmes in the *Pennsylvania Coal Co. case*:

> "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

From the foregoing we contend that the first question of the court below should be answered in the affirmative and the other four questions in the negative.

Respectfully submitted,

HENRY K. URION,
HENRY W. DRUCKER,
Solicitors for Appellant.

APPENDIX.

The Fifth Amendment to the Constitution provides:

"No person shall be * * * deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Sections 1, 4, 6, 9, 11, 12, 14, 16, 31 and 39 of the Radio Act of 1927 as amended by the Act of March 28, 1928, (U. S. C. Title 47, Sections 81-119) are as follows:

Section 1. "This chapter is intended to regulate all forms of interstate and foreign radio transmissions and communications within the United States, its Territories and possessions; to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by individuals, firms, or corporations, for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. That no person, firm, company, or corporation shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any Territory or possession of the United States or in the District of Columbia to another place in the same Territory, possession, or District; or (b) from any State, Territory, or possession, of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any state when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, com-

munications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel of the United States; or (f) upon any aircraft or other mobile stations within the United States, except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter."

Section 4. "Except as otherwise provided in this chapter, the commission, from time to time, as public convenience, interest, or necessity requires, shall—

(a) Classify radio stations;

(b) Prescribe the nature of the service to be rendered by each class of license stations and each station within any class;

(c) Assign bands of frequencies or wave lengths to the various classes of stations, and assign frequencies or wave lengths for each individual station and determine the power which each station shall use and the time during which it may operate;

(d) Determine the location of classes of stations or individual stations;

(e) Regulate the kind of apparatus to be used with respect to its external effects and the purity and sharpness of the emissions from each station and from the apparatus therein;

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this chapter: Provided, however, That changes in the wave lengths, authorized power, in the character of emitted signals, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, in the judgment of the commission, such changes will promote public convenience or interest or will serve public necessity or the provisions of this chapter will be more fully complied with;

(g) Have authority to establish areas or zones to be served by any station;

(h) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting;

(i) Have authority to make general rules and regulations requiring stations to keep such records

of programs, transmissions of energy, communications, or signals as it may deem desirable;

(j) Have authority to exclude from the requirements of any regulations in whole or in part any radio station upon railroad rolling stock, or to modify such regulations in its discretion;

(k) Have authority to hold hearings, summon witnesses, administer oaths, compel the production of books, documents, and papers and to make such investigations as may be necessary in the performance of its duties. The commission may make such expenditures (including expenditures for rent and personal services at the seat of government and elsewhere, for law books, periodicals, and books of reference, and for printing and binding) as may be necessary for the execution of the functions vested in the commission and, as from time to time may be appropriated for by Congress. All expenditures of the commission shall be allowed and paid upon the presentation of itemized vouchers therefor approved by the Chairman."

Section 6. "Radio stations belonging to and operated by the United States shall not be subject to the provisions of sections 1, 4 and 5 of this Act. All such Government stations shall use such frequencies or wave length as shall be assigned to each or to each class by the President. All such stations, except stations on board naval and other Government vessels while at sea or beyond the limits of the continental United States, when transmitting any radio communication or signal other than a communication or signal relating to Government business shall conform to such rules and regulations designed to prevent interference with other radio stations and the rights of others as the licensing authority may prescribe. Upon proclamation by the President that there exists war or a threat of war or a state of public peril or disaster or other national emergency, or in order to preserve the neutrality of the United States, the President may suspend or amend, for such time as he may see fit, the rules and regulations applicable to any or all stations within the jurisdiction of the United States as prescribed by the licensing authority, and may cause the closing of any station for radio communication and the removal therefrom of its apparatus and equipment, or he may authorize the use or control of any such

station and/or its apparatus and equipment by any department of the Government under such regulations as he may prescribe, upon just compensation to the owners. Radio stations on board vessels of the United States Shipping Board or the United States Shipping Board Merchant Fleet Corporation or the Inland and Coastwise Waterways Service shall be subject to the provisions of this Act."

Section 9. "The licensing authority, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license provided for by this Chapter. * * *

"No license granted for the operation of a broadcasting station shall be for a longer term than three years and no license so granted for any other class of station shall be for a longer term than five years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses and not to exceed five years in the case of other licenses.

"No renewal of an existing station license shall be granted more than thirty days prior to the expiration of the original license."

Section 11. "If upon examination of any application for a station license or for the renewal or modification of a station license the licensing authority shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the licensing authority upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe.

"Such station licenses as the licensing authority may grant shall be in such general form as it may prescribe, but each license shall contain, in addition to other provisions, a statement of the following conditions to which such license shall be subject:

(A) The station license shall not vest in the li-

censee any right to operate the station nor any right in the use of the frequencies or wave length designated in the license beyond the term thereof nor in any other manner than authorized therein.

(B) Neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of this Act.

(C) Every license issued under this Act shall be subject in terms to the right of use or control conferred by section 6 hereof.

In cases of emergency arising during the period of one year from and after the first meeting of the commission created hereby, or on applications filed during said time for temporary changes in terms of licenses when the commission is not in session and prompt action is deemed necessary, the Secretary of Commerce shall have authority to exercise the powers and duties of the commission, except as to revocation of licenses, but all such exercise of powers shall be promptly reported to the members of the commission, and any action by the Secretary authorized under this paragraph shall continue in force and have effect only until such time as the commission shall act thereon."

Section 12. "The station license required hereby shall not be granted to, or after the granting thereof such license shall not be transferred in any manner, either voluntarily or involuntarily, to (a) any alien or the representative of any alien; (b) to any foreign government, or the representative thereof; (c) to any company, corporation, or association organized under the laws of any foreign government; (d) to any company, corporation, or association of which any officer or director is an alien, or of which more than one-fifth of the capital stock may be voted by aliens or their representatives or by a foreign government or representative thereof, or by any company, corporation, or association organized under the laws of a foreign country.

"The station license required hereby, the frequencies or wave length or lengths authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner, either voluntarily or involuntarily, disposed of to any person, firm, company, or corporation without the consent in writing of the licensing authority."

Section 14. "Any station license shall be revocable by the commission for false statements either in the application or in the statement of fact which may be required by section 10 hereof, or because of conditions revealed by such statements of fact as may be required from time to time which would warrant the licensing authority in refusing to grant a license on an original application, or for failure to operate substantially as set forth in the license, for violation of or failure to observe any of the restrictions and conditions of this Act, or of any regulation of the licensing authority authorized by this Act or by a treaty ratified by the United States, or whenever the Interstate Commerce Commission, or any other Federal body in the exercise of authority conferred upon it by law, shall find and shall certify to the commission that any licensee bound so to do, has failed to provide reasonable facilities for the transmission of radio communications, or that any licensee has made any unjust and unreasonable charge, or has been guilty of any discrimination, either as to charge or as to service or has made or prescribed any unjust and unreasonable classification, regulation, or practice with respect to the transmission of radio communications or service: *Provided*, That no such order of revocation shall take effect until thirty days' notice in writing thereof, stating the cause for the proposed revocation, has been given to the parties known by the commission to be interested in such license. Any person in interest aggrieved by said order may make written application to the commission at any time within said thirty days for a hearing upon such order, and upon the filing of such written application said order of revocation shall stand suspended until the conclusion of the hearing herein directed. Notice in writing of said hearing shall be given by the commission to all the parties known to it to be interested in such license twenty days prior to the time of said hearing. Said hearing shall be conducted under such rules and in such manner as the commission may prescribe. Upon the conclusion hereof the commission may affirm, modify, or revoke said orders of revocation."

Section 16. "Any applicant for a construction permit, for a station license, or for the renewal or modification of an existing station license whose application is refused by the licensing authority shall have the right to appeal from said decision to the Court of Appeals of the District of Columbia; and any licensee whose license is re-

voked by the commission shall have the right to appeal from such decision of revocation to said Court of Appeals of the District of Columbia or to the district court of the United States in which the apparatus licensed is operated, by filing with said court, within twenty days after the decision complained of is effective, notice in writing of said appeal and of the reasons therefor. * * *''

Section 31. ''The expression 'radio communication' or 'radio communications' wherever used in this Act means any intelligence, message, signal, power, pictures, or communication of any nature transferred by electrical energy from one point to another without the aid of any wire connecting the points from and at which the electrical energy is sent or received and any system by means of which such transfer of energy is effected.''

Section 39. ''* * * Nothing in this section shall be construed as authorizing any person now using or operating any apparatus for the transmission of radio energy or radio communications or signals to continue such use except under and in accordance with this Act and with a license granted in accordance with the authority hereinbefore conferred.''

Sections 1, 2, 3, 4, 5 and 6 of the Radio Act of 1912 (Act of August 13, 1912, as amended March 14, 1913, U. S. C. Title 47, Chapter 3, Sections 51-63) are as follows:

Section 1: ''A person, company or corporation within the jurisdiction of the United States shall not use or operate any apparatus for radio communication as a means of commercial intercourse among the several States, or with foreign nations, or upon any vessel of the United States engaged in interstate or foreign commerce, or for the transmission of radiograms or signals the effect of which extends beyond the jursidiction of the State or Territory in which the same are made, or where interference would be caused thereby with the receipt of messages or signals from beyond the jurisdiction of the said State or Territory, except under and in accordance with a license, revocable for cause, in that behalf granted by the Secretary of Commerce upon application therefor; but nothing in sections 1 to 10 of this Act shall be construed to apply to the transmission and exchange of radiograms or signals between points situated in the same State: Provided, That the

effect thereof shall not extend beyond the jurisdiction of the said State or interfere with the reception of radiograms or signals from beyond said jurisdiction; and a license shall not be required for the transmission or exchange of radiograms or signals by or on behalf of the Government of the United States, but every Government station on land or sea shall have special call letters designated and published in the list of radio stations of the United States by the Department of Commerce. Any person, company, or corporation that shall use or operate any apparatus for radio communication in violation of this section, or knowingly aid or abet another person, company, or corporation in so doing, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $500, and the apparatus or device so unlawfully used and operated may be adjudged forfeited to the United States."

Section 2: "Every such license shall be in such form as the Secretary of Commerce shall determine and shall contain the restrictions, pursuant to sections 1 to 10 of this Act, on and subject to which the license is granted; every such license shall be issued only to citizens of the United States or Porto Rico or to a company incorporated under the laws of some State or Territory or of the United States or Porto Rico, and shall specify the ownership and location of the station in which said apparatus shall be used and other particulars for its identification and to enable its range to be estimated; shall state the purpose of the station, shall state the wave length or the wave lengths authorized for use by the station for the prevention of interference and the hours for which the station is licensed for work; and shall not be construed to authorize the use of any apparatus for radio communication in any other station than that specified. Every such license shall be subject to the regulations contained herein and such regulations as may be established from time to time by authority of sections 1 to 10 of this Act or subsequent Acts and treaties of the United States. Every such license shall provide that the President of the United States in time of war or public peril or disaster may cause the closing of any station for radio communication and the removal therefrom of all radio apparatus, or may authorize the use or control of any such station or

apparatus by any department of the Government, upon just compensation to the owners."

Section 3: "Every such apparatus shall at all times while in use and operation as aforesaid be in charge or under the supervision of a person or persons licensed for that purpose by the Secretary of Commerce. * * * "

Section 4: "For the purpose of preventing or minimizing interference with communication between stations in which such apparatus is operated, to facilitate radio communication, and to further the prompt receipt of distress signals, said private and commercial stations shall be subject to the regulations of this section. These regulations shall be enforced by the Secretary of Commerce through the collectors of customs and other officers of the Government as other regulations herein provided for.

"The Secretary of Commerce may, in his discretion, waive the provisions of any or all of these regulations when no interference of the character above mentioned can ensue. * * * "

"REGULATIONS

NORMAL WAVE LENGTH."

"* * * *

"DISTANCE REQUIREMENT FOR DISTRESS SIGNALS."

"* * * *

"PENALTIES."

"* * * *